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No. 90-1184

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

QUALITY TECHNOLOGY COMPANY, PETITIONER

v.

STONE & WEBSTER ENGINEERING COMPANY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

EDWARD S. CHRISTENBURY
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902

JAMES E. FOX
Deputy General Counsel

ROBERT C. GLINSKI
Assistant General Counsel

THOMAS C. DOOLAN
Senior Litigation Attorney
Tennessee Valley Authority

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QUESTIONS PRESENTED

1. Whether the Tennessee Valley Authority's Manager of Nuclear Power, who served as a "loaned employee" pursuant to a contract with a private consulting firm, is entitled to absolute immunity from suit under state tort law for discretionary actions within the scope of his duties.

2. Whether the courts below properly granted summary judgment on petitioner's *Bivens* claims.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Barr v. *Matteo*, 360 U.S. 564 (1959)	5, 8
Blair v. *Board of Regents*, 496 F.2d 322 (6th Cir. 1974)	16
Board of Regents v. *Roth*, 408 U.S. 564 (1972)	15
Boyle v. *United Technologies Corp.*, 487 U.S. 500 (1988)	7, 10, 12, 13
Bushman v. *Seiler*, 755 F.2d 653 (8th Cir. 1985)	10
Cleavinger v. *Saxner*, 474 U.S. 193 (1985)	5
GF Business Equip. Co. v. *TVA*, 430 F. Supp. 699 (E.D. Tenn. 1975), aff'd, 556 F.2d 581 (6th Cir. 1977)	15
Hadley v. *County of Du Page*, 715 F.2d 1238 (7th Cir. 1983), cert. denied, 465 U.S. 1006 (1984)	16
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)	15
Inryco, Inc. v. *TVA*, 471 F. Supp. 59 (E.D. Tenn. 1978)	15
Lake Mich. College Fed'n of Teachers v. *Lake Mich. Community College*, 518 F.2d 1091 (6th Cir. 1975), cert. denied, 427 U.S. 904 (1976)	16
Logue v. *United States*, 412 U.S. 521 (1973)	10
Munson v. *Friske*, 754 F.2d 683 (7th Cir. 1985)	16
Ownby v. *Kleyhammer*, 194 Tenn. 109, 250 S.W.2d 37 (1952)	13
Paul v. *Davis*, 424 U.S. 693 (1976)	7, 15
Queen v. *TVA*, 508 F. Supp. 532 (E.D. Tenn. 1980), aff'd, 689 F.2d 80 (6th Cir. 1982), cert. denied, 460 U.S. 1082 (1983)	8
Russell v. *Hodges*, 470 F.2d 212 (2d Cir. 1972)	16
Stewart v. *Craig*, 208 Tenn. 212, 344 S.W.2d 761 (1961)	13

Cases—Continued: Page

Stretten v. *Wadsworth Veterans Hosp.*, 537 F.2d 361 (9th Cir. 1976) 16
Tennessee Elec. Power Co. v. *TVA*, 306 U.S. 118 (1939) 2
United States v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961) 14
United States v. *Orleans*, 425 U.S. 807 (1976) 10
Walters v. *TVA*, 503 F. Supp. 111 (E.D. Tenn. 1980), aff'd, 698 F.2d 1225 (6th Cir.), cert. denied, 459 U.S. 823 (1982) 8-9
Westfall v. *Erwin*, 484 U.S. 292 (1988) 5, 8, 9
Yearsley v. *W.A. Ross Constr. Co.*, 309 U.S. 18 (1940) 10

Constitution and statutes:

U.S. Const. Amend. V (Due Process Clause) 7
Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub.L. No. 100-694, 102 Stat. 4563 9
§ 8, 102 Stat. 4565-4566 9
§ 9, 102 Stat. 4566-4567 9
Federal Tort Claims Act, 28 U.S.C. 2680(a) 13
Tennessee Valley Authority Act of 1933, 16 U.S.C. 831 *et seq.*:
16 U.S.C. 831-831dd 2
16 U.S.C. 831b 11
16 U.S.C. 831c(g) 12
16 U.S.C. 831c-2 9
16 U.S.C. 831h(b) 12
5 U.S.C. 5531-5532 11
18 U.S.C. 202 11
18 U.S.C. 208(a) 7, 11, 13, 14
18 U.S.C. 208(b) 14
42 U.S.C. 5851 6

Miscellaneous:

Op. Comptroller Gen., No. B-22234, 86 Fed. Pay & Ben. Rep. (LRP Pub.) ¶ 1087 (June 2, 1986) .. 11, 12
Restatement (Second) of Agency (1958) 10

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 92-93) is unreported, but the decision is noted at 909 F.2d 1484. The opinions of the district court (Pet. App. 3-91) are reported at 745 F. Supp. 1331.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1990. A petition for rehearing was denied on October 19, 1990. Pet. App. 94-95. The petition for a writ of certiorari was filed on January 17,

1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1 a. In April 1985, petitioner entered into a one-year contract with the Tennessee Valley Authority to provide services in connection with the development of a program to identify employee safety concerns at TVA's Watts Bar Nuclear Plant.[1] Petitioner undertook to interview all employees at the Watts Bar Plant and develop procedures for gathering and processing confidential employee interviews. The contract provided for petitioner to render services "when and as requested" by TVA. The original contract provided that the fee for petitioner's services would not exceed $3.6 million; that amount was later increased to $5.6 million. Pet. App. 4-6; Gov't C.A. Br. 9-10.

Petitioner's interviews resulted in a large backlog of pending employee concerns. At TVA's request, petitioner submitted a proposal to modify its contract to give petitioner additional responsibility for investigating the pending concerns. Petitioner proposed to increase its maximum fee to TVA by some $11.5 million. TVA concluded that petitioner's proposal did not suit the agency's needs, but proposed to continue petitioner's involvement and to increase the amount of the contract, first by $750,000 and then by $1.5 million. Petitioner and TVA were unable to reach agreement on a contract modification. Petitioner ceased work when the full amount authorized under

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[1] TVA is a government agency, created by the Tennessee Valley Authority Act of 1933 (TVA Act), 16 U.S.C. 831-831dd, that, among other things, supplies electricity to large areas of Tennessee and adjoining States. The TVA is "an instrumentality of the United States." *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118, 134 (1939).

the contract had been expended. Pet. App. 6-8; Gov't C.A. Br. 10, 18-20.

In January 1986, TVA and petitioner entered into a second contract, for a maximum of $635,000, under which petitioner agreed to provide services "when and as requested" in connection with the development of an in-house employee concerns program that would receive, investigate, and resolve employee concerns raised throughout TVA beginning in February 1986. TVA subsequently determined that it would not need any services from petitioner under this contract after January 31, 1986, and it so informed petitioner. Pet. App. 7; Gov't C.A. Br. 10-11, 19.

b. In 1985, TVA's nuclear power program faced serious difficulties. TVA had shut down its operating nuclear power generators at Sequoyah and Browns Ferry. The agency had not applied for a license to operate the Watts Bar Plant, even though that facility was essentially complete. In response to this situation, TVA hired respondent Steven A. White, a retired admiral with extensive experience in the Navy's nuclear power program, to serve as the agency's Manager of Nuclear Power. White's services were provided to TVA pursuant to a contract between TVA and respondent Stone & Webster Engineering Corporation, an engineering consulting firm. Stone & Webster, in turn, contracted with respondents Stemar Corporation (a consulting company whose only employees are Mr. White and his wife) and Beta, Inc. (another consulting firm) to provide the services of White and up to 12 additional individuals to TVA as "loaned employees." Pet. App. 8-9; Gov't C.A. Br. 11-15.

White began work for TVA on January 13, 1986. His duties and responsibilities were defined by a memorandum of understanding between TVA's Board of

Directors and White. The memorandum provided that White had "direct authority for the management, control and supervision of TVA's entire nuclear power program." Pet. App. 30 (quoting memorandum). As Manager of Nuclear Power, White was "TVA's principal spokesman on public information matters" and the "primary line manager with responsibility to determine the need for * * * all * * * services required for the nuclear power program," and was "authorized to take any other actions that he deem[ed] necessary or appropriate to improve the effectiveness of the overall management of TVA's nuclear power program." *Id.* at 30-33 (quoting memorandum).[2]

2. In January 1987, petitioner sued respondents in state court. Petitioner's complaint alleged that respondents had (1) conspired among themselves to induce TVA to breach its contracts with petitioner; (2) tortiously interfered with petitioner's business relationship with TVA; and (3) disparaged petitioner's business reputation. Pet. App. 10. Petitioner's disparagement claim was based on allegations that White told a Congressman that petitioner "cost too much, was too slow, and didn't meet White's standards of quality," and that petitioner was "lazy, slow, and their reports are the worst I have ever read." *Id.* at 62. Petitioner also alleged that one of the principals of respondent Beta told a Department of Labor investigator that petitioner "was a cancer to be dealt with." *Ibid.* In addition to its state law claims, petitioner asserted a *Bivens* claim alleging that respond-

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[2] Admiral White left his position as TVA's Manager of Nuclear Power after the agency successfully returned both of the Sequoyah nuclear generating units to operation. Gov't C.A. Br. 15 n.6.

ents, while exercising "governmental responsibilities," had deprived petitioner of protected property and liberty interests without due process of law. Pet. App. 10-11; Gov't C.A. Br. 20-22.

a. Respondents removed the case to the United States District Court for the Eastern District of Tennessee. Following discovery, the district court granted respondents' motion for summary judgment on all claims. Pet. App. 1-91.

As to petitioner's state law claims, the district court held (Pet. App. 19-46) that White was entitled to absolute immunity under *Westfall* v. *Erwin*, 484 U.S. 292 (1988), and *Barr* v. *Matteo*, 360 U.S. 564 (1959). The court rejected petitioner's argument that White was "not a federal employee of the kind entitled to immunity from suit." Pet. App. 20. The court observed that the contractual relationship among TVA, Stone & Webster, and Stemar "reveal[s] an intent to side-step regular hiring practices and the related * * * limitations on salary and compensation." *Id.* at 20-21. But the court concluded that White's status as a loaned employee did not affect his entitlement to immunity. Because official immunity is "an expression of a policy designed to aid in the effective functioning of government," *Barr*, 360 U.S. at 572-573, the court said that it is the nature of the defendant's duties, rather than his status, that determines immunity. Pet. App. 25-26 (citing *Cleavinger* v. *Saxner*, 474 U.S. 193, 201 (1985)).

Applying this "functional inquiry" (Pet. App. 27), the district court held that petitioner's contractual relationship with TVA was within the scope of White's duties as Manager of Nuclear Power. *Id.* at 39. White had "responsibility for the operation of TVA's entire nuclear program, answering only to the General Manager and the Board of Directors." *Id.* at

37. "[I]dentifying and addressing the safety concerns expressed by TVA employees was a high priority task, crucial to returning the TVA nuclear program to operating status." *Id.* at 38. The court, observing that petitioners "have failed to challenge the [respondents'] claims that their actions were discretionary," concluded that White's alleged actions "were in fact discretionary." *Id.* at 44. In particular, White's allegedly defamatory statements were within his discretion as TVA's principal spokesman on nuclear power matters.[3] *Id.* at 43. Accordingly, the court held that White was entitled to absolute immunity from liability on petitioner's state law tort claims. The court proceeded to dismiss the state law claims against the corporate respondents because, under Tennessee law, there is no vicarious liability unless the agent is subject to individual liability. Pet. App. 45-46 (citing authorities).[4]

The court also granted summary judgment for respondents on petitioner's constitutional tort claims. Pet. App. 46-47. Because petitioner's contracts with TVA provided that petitioner would render services only "when and as requested by TVA," the court was "hard pressed to find a property interest created by the * * * contract." *Id.* at 49. The court also rejected petitioner's alternative argument that it suffered deprivation of a protected liberty interest in its reputation. The court noted that injury to

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[3] The court held that a statement allegedly made by a principal of respondent Beta, Inc. to an investigator for the Department of Labor was privileged under 42 U.S.C. 5851. See Pet. App. 73.

[4] In addition, the court observed that petitioner's claim for trade disparagement appeared to be barred by the statute of limitations. Pet. App. 16 & n.1.

reputation, without more, is not protected under the Due Process Clause. See *Paul* v. *Davis*, 424 U.S. 693 (1976). Respondents' alleged statements, which concerned the adequacy of petitioner's performance rather than its honesty or morality, did not carry the kind of stigma that might give rise to a procedural due process claim. Moreover, the court concluded that an affidavit submitted by petitioner failed to show that it was foreclosed from obtaining other employment as a result of the alleged statements. Pet. App. 56. In any event, the court held, respondent White was entitled to qualified immunity for his statements, because they violated no clearly established right of petitioner. Pet. App. 70-71.

b. The district court denied petitioner's motion to alter or amend the judgment. Pet. App. 79-91. In response to petitioner's contention that White "was not 'lawfully entrusted' with the requisite discretionary authority necessary to assert the protection of official immunity," *id.* at 83, the court said that "it would appear that White was in fact 'lawfully entrusted' with the authority to perform the discretionary functions relating to [petitioner]." *Id.* at 83-84. The court found nothing in the record to show that the arrangement between TVA and respondents was improper under 18 U.S.C. 208(a). And even if the arrangement between TVA and White was improper, White and TVA nevertheless shared "the same interest in getting the Government's work done." Pet. App. 84 (quoting *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 505 (1988)). The court also rejected petitioner's contention that summary judgment was inappropriate in light of its allegation of a conspiracy to "obtain control of TVA's nuclear program." The court noted that respondents' motives

are irrelevant to White's entitlement to absolute immunity. Pet. App. 89-90 (citing *Barr* v. *Matteo*, 360 U.S. at 575).

3. The court of appeals affirmed for the reasons stated by the district court. Pet. App. 92-93.

ARGUMENT

As petitioner recognizes (Pet. 59), this case concerns an "unusual" employment arrangement adopted by TVA in response to a crisis in its nuclear power program. Because this unusual situation is unlikely to recur, and because the decision of the courts below is correct and does not conflict with any decision of this Court or any other court of appeals, further review is not warranted.

1. a. In *Westfall* v. *Erwin*, 484 U.S. 292, 300 (1988), this Court held that federal officials are absolutely immune from tort liability under state law for conduct that is "within the outer perimeter of an official's duties and is discretionary in nature." The reason for this immunity is that

> officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Barr v. *Matteo*, 360 U.S. 564, 571 (1959). The doctrine of official immunity is fully applicable to TVA officials. See *Queen* v. *TVA*, 508 F. Supp. 532 (E.D. Tenn. 1980), aff'd, 689 F.2d 80 (6th Cir. 1982), cert. denied, 460 U.S. 1082 (1983); *Walters* v. *TVA*, 503

F. Supp. 111 (E.D. Tenn. 1980), aff'd, 698 F.2d 1225 (6th Cir.) (Table), cert. denied, 459 U.S. 823 (1982).[5]

Petitioner does not dispute the lower courts' conclusion that respondent White acted within the scope of his duties as TVA's Manager of Nuclear Power, or that his alleged actions were discretionary in nature. The courts below are plainly correct on these points. As Manager of Nuclear Power, White had "direct authority for the management, control and supervision of TVA's entire nuclear power program." Pet. App. 30. His broad duties included, among other things, acting as TVA's "principal spokesman on public information matters, * * * [and as] the primary line manager with responsibility to determine the need for * * * services required for the nuclear power program." *Id.* at 31-32.

Petitioner asserts (Pet. 19-40), however, that White was an independent contractor, and that independent contractors are not entitled to official immunity for conduct that is discretionary in nature. As an initial matter, petitioner errs in its blanket

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[5] In response to this Court's decision in *Westfall* v. *Erwin*, *supra*, Congress passed legislation providing that federal employees are absolutely immune from suit under state law for acts within the scope of their employment. See Federal Employees Liability Reform and Tort Compensation Act of 1988 (Reform Act), Pub. L. No. 100-694, 102 Stat. 4563. The Reform Act applies to all claims that were pending on November 18, 1988. See § 8, 102 Stat. 4565-4566. It also applies to employees of the TVA. *See* § 9, 102 Stat. 4566-4567; 16 U.S.C. 831c-2. Thus, to the extent that White is an employee under the Reform Act, he is entitled to absolute immunity from suit under state law. And since petitioner does not dispute that White's actions were discretionary in nature, White is also entitled to absolute immunity under this Court's decision in *Westfall*.

assertion that independent contractors who exercise discretion are never entitled to immunity. See, *e.g.*, *Boyle* v. *United Technologies Corp.*, 487 U.S. at 512-513 (contractor may be immune even if it exercised some discretion in design of military equipment); *Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18 (1940) (landowner barred from suing government contractor on claim that construction of a dam eroded land). See also *Bushman* v. *Seiler*, 755 F.2d 653 (8th Cir. 1985) (consultant to an insurance company that served as a Medicare carrier deemed a government official for immunity purposes). In any event, petitioner has mischaracterized the nature of White's relationship to TVA. As Manager of Nuclear Power, White was a "primary line manager" who reported "directly to the General Manager and Board of Directors" of TVA. Pet. App. 32 (quoting Memorandum of Understanding). Consequently, White was acting in the capacity of an employee of TVA.[6]

Petitioner asserts that a contract between TVA and respondent Stemar Corporation entered into on January 7, 1987 (nearly a year after the actions alleged

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[6] See generally Restatement (Second) of Agency § 2(2) (1958) ("A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master."); *id.* § 2(3) ("An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."). Cf. *United States* v. *Orleans*, 425 U.S. 807, 814 (1976) (under Federal Tort Claims Act, critical element in distinguishing federal agency from contractor is "power of the Federal government 'to control the detailed physical performance of the contractor.'" (quoting *Logue* v. *United States*, 412 U.S. 521, 528 (1973)).

in petitioner's complaint) demonstrates that White "has gone to great lengths to establish that he is an Independent Contractor and not a federal employee." Pet. 19-20. But as petitioner itself notes (*id.* at 20), the contract provided only that *Stemar* was an independent contractor, and that *Stemar* should not be deemed to be an agent or employee of TVA. The contract did not provide that *White*, as TVA's Manager of Nuclear Power, would not be an agent or employee of TVA. On the contrary, the contract expressly provided that White would comply with 18 U.S.C. 208(a), a statute that applies only to "an officer or employee of the executive branch of the United States Government [or] any independent agency of the United States." Similarly, TVA's memorandum of understanding with White subjected him to "all applicable TVA rules and procedures covering TVA employees." Pet. App. 33.[7]

Petitioner also relies (Pet. 15-16) on an opinion of the Comptroller General concluding that TVA's contractual arrangement for White's services was an improper contract for personal services. 86 Fed. Pay & Ben. Rep. (LRP Pub.) ¶ 1087 (June 2, 1986). As petitioner recognizes (Pet. 16), the Comptroller General's opinion is not conclusive on this issue, and an

[7] It is true that TVA's relationship with White was designed to avoid the salary cap for a "regular officer or employee of [TVA]" established by 16 U.S.C. 831b, as well as the restrictions on dual pay established by 5 U.S.C. 5531-5532. In addition, White did not fit the definition of a "special Government employee" within the meaning of 18 U.S.C. 202, because his services were obtained for more than 130 days during a 365-day period. Although TVA's arrangement with White may not have fit a standard federal employment category, there is no doubt that he reported to TVA's General Manager and Board of Directors, which had the right to control his official actions.

independent counsel has concluded that TVA's contractual relationship with White was proper.[8] C.A. App. 2153-2254. In any event, the Comptroller General's opinion does not support petitioner's position. That opinion recognizes that TVA's arrangement with White did "not involve the performance of a particular job or task without supervision and control by the Government, but rather involves the management of TVA's nuclear power program," and concludes that "the contractual arrangement between TVA and Mr. White clearly establishes an employer-employee relationship." 86 Fed. Pay & Ben. Rep. at X-86-130.

Petitioner's reliance on this Court's decision in *Boyle* v. *United Technologies Corp.*, *supra*, is misplaced. *Boyle* held that government contractors are immune from suit under state tort law for design defects in military equipment when the government approves "reasonably precise specifications," the equipment conforms to those specifications, and the contractor warns the government of dangers that were known to it but not to the government. 487 U.S. at 512. The Court said that "the first two of these conditions assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated—*i.e.*, they assure that the design feature in question was considered by a Government

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[8] Congress has granted the TVA exceptionally broad authority to enter into contracts for services. TVA is authorized "subject only to the provisions of the [TVA Act] * * * to enter into such contracts, agreements, and arrangements, upon such terms and conditions and in such manner as it may deem necessary," and to "determine * * * the * * * contents of its contracts and other business documents except as otherwise provided in the [TVA Act]." 16 U.S.C. 831h(b). See also 16 U.S.C. 831c(g).

officer, and not merely by the contractor itself." *Ibid.* To permit "second-guessing" of discretionary judgments by TVA's Manager of Nuclear Power through state law claims merit no further review. Petitioner sought to be avoided" by the discretionary function exemption of the Federal Tort Claims Act, 28 U.S.C. 2680(a), as well as by the Court's decision in *Boyle*. 487 U.S. at 511.[9]

b. Petitioner's other contentions concerning its state law claims merit no further review. Petitioner claims (Pet. 41-44) to have alleged that respondents engaged in tortious activity before White assumed his duties as Manager of Nuclear Power. But the district court rejected this fact-bound contention, finding that petitioner "alleges its injury to be the direct result of the discretionary actions of Mr. White, while acting in his official capacity." Pet. App. 45. In addition, the court below correctly granted summary judgment in favor of the corporate respondents on petitioner's state law claims. Under Tennessee law, a principal cannot be held vicariously liable unless its agent is subject to liability. See *Stewart* v. *Craig*, 208 Tenn. 212, 217-218, 344 S.W.2d 761, 763 (1961); *Ownby* v. *Kleyhammer*, 194 Tenn. 109, 250 S.W.2d 37 (1952).

2. Petitioner contends (Pet. 44-49) that respondents are not entitled to immunity because White's alleged actions were illegal under 18 U.S.C. 208(a).[10]

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[9] See also note 5, *supra* (immunity under Reform Act).

[10] Section 208(a) provides:

> Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, [or] of any independent agency of the United States * * * participates personally and substantially as a Government officer or em-

That contention is without merit. The fact that a federal official may be subject to criminal penalties for participating in a matter in which he has a personal interest does not imply that the official is not exercising discretionary authority within the scope of his employment. Moreover, petitioner's allegation of illegality is unfounded. Pursuant to 18 U.S.C. 208(b), the TVA Board determined that White's interest in Stone & Webster was not so substantial as to affect the integrity of the services rendered. See Pet. 60. The Board based its determination on the fact that White would be paid the same amount regardless of whether TVA purchased any other services from Stone & Webster, and on the fact that the TVA Board itself, rather than White, authorized the purchase of services from Stone & Webster.[11]

3. Finally, petitioner renews its contention (Pet. 50-59) that respondent deprived it of constitutionally protected property and liberty interests without due process. That contention warrants no further review. The courts below correctly held that petitioner had no claim that protected property or liberty interests had been infringed, and that White was entitled to quali-

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ployee * * * in a * * * matter in which, to his knowledge, he * * * [or any] organization in which he is serving as officer, director, trustee, partner or employee * * * has a financial interest—shall be fined not more than $10,000, or imprisoned not more than two years, or both.

[11] *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), is of no help to petitioner. In that case, the Court framed the question presented as "whether the Government may disaffirm a contract which is infected by an illegal conflict of interest." *Id.* at 566. The Court did not suggest that any government contract entered into in violation of 18 U.S.C. 208(a) is void even if the government chooses to enforce the contract despite the conflict of interest.

fied immunity because there had been no invasion of any "clearly established" legal rights, Pet. 69 (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-818 (1982)).

Petitioner had no legitimate claim of entitlement to continuation of its contracts or to additional payments from TVA. See *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) (property interest entails a "legitimate claim of entitlement" to the claimed benefit). The TVA Act itself certainly did not grant petitioner a right to provide additional services to TVA. See *Inryco, Inc.* v. *TVA*, 471 F. Supp. 59 (E.D. Tenn. 1978); *GF Business Equip. Co.* v. *TVA*, 430 F. Supp. 699 (E.D. Tenn. 1975), aff'd, 556 F.2d 581 (6th Cir. 1977). And petitioner's contracts with TVA provided for petitioner to render services only "when and as requested" by TVA. Pet. App. 49-50. Absent a request by TVA, petitioner had no right to perform any services or receive any payment from TVA. Moreover, all monies authorized under petitioner's principal contract with TVA were in fact expended.

In addition, petitioner failed to state a valid claim for deprivation of a protected liberty interest. Damage to reputation, without more, is not a deprivation of constitutionally protected liberty. See *Paul* v. *Davis*, 424 U.S. 693, 708-712 (1976). A plaintiff asserting an unconstitutional deprivation of a liberty interest in this context must show that government officials not only defamed him, but did so to such an extent as to brand his reputation with a "stigma" that deprived the plaintiff of some affirmative right previously held under state law. *Id.* at 708, 711. Here, the district court found (Pet. App. 65) that "[t]he statements made by White * * * merely reflected White's opinion of the competence and job

performance of [petitioner]." Such statements are not stigmatizing. See, *e.g.*, *Russell* v. *Hodges*, 470 F.2d 212, 215 n.2 (2d Cir. 1972); *Blair* v. *Board of Regents*, 496 F.2d 322, 324 (6th Cir. 1974); *Lake Mich. College Fed'n of Teachers* v. *Lake Mich. Community College*, 518 F.2d 1091, 1097 (6th Cir. 1975), cert. denied, 427 U.S. 904 (1976); *Stretten* v. *Wadsworth Veterans Hosp.*, 537 F.2d 361, 366 (9th Cir. 1976). See also *Munson* v. *Friske*, 754 F.2d 683, 693 (7th Cir. 1985); *Hadley* v. *County of Du Page*, 715 F.2d 1238, 1245 (7th Cir. 1983), cert. denied, 465 U.S. 1006 (1984). Consequently, the courts below properly rejected petitioner's procedural due process claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S. CHRISTENBURY
General Counsel
Tennessee Valley Authority

JAMES E. FOX
Deputy General Counsel

ROBERT C. GLINSKI
Assistant General Counsel

THOMAS C. DOOLAN
Senior Litigation Attorney
Tennessee Valley Authority

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